Wing Woh Trading Sdn Bhd v Irama Jaya Development Sdn Bhd

HIGH COURT (PULAU PINANG) — PETITION (COMPANY WINDING UP) NO PA-28NCC-103–09 OF 2018
AZMI ABDULLAH JC
20 JANUARY 2019

Companies and Corporations — Winding up — Petition — Whether petitioner creditor — Whether winding up court appropriate forum for petitioner to pursue its claim — Whether amount claimed as stated in statutory notice actually due and owing — Whether accounts enclosed in without prejudice letter to petitioner tantamount to final accounts — Whether petitioner came to winding up court with clean hands — Companies Act 2016 ss 465(1)(e) & 466

The petition pertained to a dispute between the petitioner/landowner and the respondent/developer and was based on the ground that the respondent was unable to pay its debt (which was denied) under ss 466 and 465(1)(e) of the Companies Act 2016 after the respondent having made no payment for the alleged debt of RM1,214,266.74 plus interest of RM103,017.02, within period of 21 days as required in the statutory notice dated 31 July 2018 ('the said notice'). It was undisputed fact that the alleged debt of RM1,214,266.74 plus interest of RM103,017.02 was not a judgment debt in the present case. The respondent had made part payment to the petitioner under the joint venture agreement in the sum of RM1,143,400. The sum in dispute now was the final entitlement of the parties under the joint venture agreement dated 9 September 2009. The final entitlement of the petitioner could not be ascertained yet until all the units have been sold. However, due to the petitioner's own acts, by caveating the eight units on 29 December 2017, the remaining units could not be sold and could not be realised into cash. The respondent argued that this was done in bad faith as it breached the main joint venture agreement as well as the power of attorney granted together with it. The petitioner had neither terminated the joint venture agreement nor revoked the power of attorney that came with it. Yet on the other hand, the petitioner had caveated all the relevant properties/units on the said land (Lot 748) and this had hindered and/or blocked the respondent from selling the units therein. The petitioner caveated the relevant units on 29 December 2017, which was long before the petition was filed with the caveat action being contested by the respondent. It was unlawful and in breach of the main joint venture agreement and had cause substantial loss and damage to the respondent which the respondent possessed a counterclaim/cross-claim against the petitioner for the recovery of the relevant loss and damages faced by the respondent from third party claims due to the respondent's inability to transfer the properties/units

even though the full purchase price had been paid. Further, the respondent submitted that the accounts relied on by the petitioner for the basis of this winding up petition was not final accounts and moreover the accounts prepared dated 26 April 2018 was attached to a 'without prejudice' letter which was merely for purposes of settlement and on the basis that the petitioner would accept two units in kind and the remaining RM267,586.74 was to be paid in money (cheque). The petitioner had taken the stand to refuse to accept the without prejudice offer, yet rely on the accounts enclosed in the without prejudice offer as a final account. The figure therein was merely for settlement purposes and was only calculated on the basis that the two units therein would be accepted by the petitioner. Failing which, the figure was undetermined and not finalised as of the filing of this petition, and the petitioner should file a civil suit instead and not a winding up petition.

Held, dismissing the winding up petition with costs:

(1) The court believed that the respondent had a valid counterclaim/cross-claim against the petitioner which could be set off against any sums due and owing to the petitioner and the proper forum for the dispute and issues between parties were not in this winding up petition but for the parties to file a civil suit. The duty of the court here was not to delve into the issue of caveat being entered but as of the moment the debt was clearly being disputed (see para 13).

(2) The said notice issued under s 466 of the Companies Act 2016 was not evidence of the debt. To continue to invoke winding up proceedings when the alleged debt was seriously disputed, constituted an abuse of process of court. The petitioner could and should have filed separate action in the civil court for that purpose. The respondent had a cross-claim against the petitioner which had not reasonably been able to be litigated yet. The petitioner had the liberty to proceed with summary judgment in the civil suit if their stand was that the respondent had no defence to his claim. Upon getting a judgment, the petitioner could then file a winding up petition against the respondent based on the judgment sum without there being any prejudice to the petitioner (see paras 26–27).

(3) The court found that since the alleged final accounts was annexed to a without prejudice letter, it should be dismissed and/or declared inadmissible and could not be relied on by the petitioner to form the basis of this winding up. Further, the petitioner had the onus of proving that there was an undisputed debt owed by the respondent and the respondent was insolvent. From the affidavits, the petitioner simply had not done so (see paras 46 & 50).

(4) The burden and/or onus of proof was on the petitioner to prove that the respondent was insolvent by either showing that the company was

dormant, no longer in business, had significant unpaid cheques or unsatisfied judgments as per the case cited. In the present petition, it was clear that based on the audited account for 2017 of the respondent, it could be seen from the total assets and liabilities that there was a surplus and/or figure being positive. The company was still functioning, and in the midst of selling the remaining unsold units. The units which had purchasers who had actually paid, could not be materialised as the petitioner had prevented the transfer to go through. The remaining pending units unsold and/or not transferred had been halted due to the petitioner's own acts (see paras 52–53).

(5) The petitioner was in breach of the terms and conditions in the joint venture agreement as well as the power of attorney that came with it. The petitioner on the one hand, demanded payment and demanded the respondent to abide by the joint venture agreement, yet at the same time caveated all the unsold units long before the petition was even filed. The petitioner was well aware that there were units which purchasers had made payment for the full purchase price of the units with the transfers of which could not be executed due to the petitioner's own caveats. The petitioner's own actions had caused the respondent to be unable to realise the assets/units into monies and had caused the respondent grave losses and damages as well (see paras 61–62).

(6) The petitioner hence was the author of their own misfortune and the events and incidents complained of and could not now come to the court to take advantage of his own wrongdoings. The petitioner should thus be denied the relief in the absence of clean hands. It was clearly an abuse of process for this petition to have been presented based on a document annexed to a without prejudice and privileged correspondences, as well as based on a substantially disputed debt. The petitioner was not entitled to apply for a winding up order (see paras 63–64).

[Bahasa Malaysia summary

Petisyen ini berkenaan pertikaian di antara pempetisyen/tuan tanah dan responden/pemaju dan berdasarkan asas bahawa responden tidak dapat membayar hutangnya (yang di mana adalah dinafikan) di bawah ss 466 dan 465(1)(e) Akta Syarikat 2016 selepas responden tidak membuat bayaran terhadap hutang yang dikatakan berjumlah RM1,214,266.74 dengan faedah berjumlah RM103,017.02, di dalam tempoh 21 hari sepertimana yang diminta di dalam notis statutori bertarikh 31 Julai 2018 ('notis tersebut'). Ia adalah fakta yang tidak disangkal bahawa hutang yang dikatakan yang berjumlah RM1,214,266.74 dengan faedah berjumlah RM103,017.02 bukanlah hutang penghakiman di dalam kes ini. Responden telah membuat pembayaran separuh kepada pempetisyen di bawah perjanjian usahasama berjumlah RM1,143,400. Jumlah yang dipertikaikan ini adalah hak pihak-pihak di bawah perjanjian usahasama bertarikh 9 September 2009. Hak

akhir pempetisyen tidak boleh ditentukan lagi sehingga semua unit-unit telah dijual. Walau bagaimanapun, disebabkan tindakan pempetisyen sendiri, dengan meletakkan kaveat ke atas lapan unit-unit pada 29 Disember 2017, baki unit-unit tidak dapat dijual dan tidak dapat ditukarkan kepada tunai. Responden menghujahkan bahawa ini dilakukan dengan niat buruk kerana ia melanggar perjanjian usahasama dan juga kuasa wakil yang diberikan bersama. Pempetisyen tidak ada menamatkan perjanjian usahasama ataupun membatalkan kuasa wakil yang datang bersamanya. Tetapi sebaliknya, pempetisyen telah meletakkan kaveat ke atas semua hartanah yang relevan/unit-unit atas tanah tersebut (Lot 748) dan ini telah menghalang dan/atau menyekat responden daripada menjual unit-unit di situ. Pempetisyen meletakkan kaveat ke atas unit-unit yang relevan pada 29 December 2017, yang mana adalah lama sebelum petisyen difailkan dengan tindakan kaveat yang dibantah oleh responden. Ia adalah salah di sini undang-undang dan melanggar perjanjian usaha sama dan telah menyebabkan kehilangan dan kerugian besar yang mana responden telah milik tuntutan balas/tuntutan bersilang terhadap pempetisyen untuk mendapatkan semula kehilangan dan kerugian yang relevan yang dihadapi oleh responden daripada tuntutan pihak ketiga disebabkan oleh ketidakbolehan responden untuk memindahkan hartanah-hartanah/unit-unit walaupun harga belian penuh telah dilunaskan. Selanjutnya, responden menghujahkan bahawa akaun-akaun yang disandarkan oleh pempetisyen untuk menjadi asas untuk petisyen penggulungan bukanlah akaun-akaun akhir dan tambahan pula, akaun-akaun yang disediakan bertarikh 26 April 2018 dilampirkan dengan surat 'tanpa prejudis' yang mana hanyalah untuk tujuan-tujuan penyelesaian dan pada asas bahawa pempetisyen akan menerima dua unit-unit seumpamanya dan baki RM267,586.74 dibayar di dalam bentuk duit (cek). Pempetisyen telah mengambil keputusan untuk menolak penerimaan tawaran tanpa prejudis, tetapi bergantung pada akaun-akaun yang dilampirkan di dalam tawaran tanpa prejudis sebagai akaun akhir. Jumlah yang terdapat di situ hanyalah untuk tujuan penyelesaian dan hanya dikira atas dasar bahawa dua unit-unit di situ akan diterima oleh pempetisyen. Jika gagal, jumlah yang terdapat di situ tidak dapat ditentukan dan tidak dimuktamadkan pada pemfailan petisyen ini, dan pempetisyen sepatutnya memfailkan saman sivil dan bukanlah petisyen penggulungan.

Keputusan, menolak petisyen penggulungan dengan kos:

(1) Mahkamah yakin bahawa responden mempunyai tuntutan balas yang sah/tuntutan silang terhadap pempetisyen yang mana boleh ditolak dengan apa-apa jumlah yang masih kena dibayar dan terhutang kepada pempetisyen dan forum yang sesuai untuk pertikaian dan isu-isu antara pihak-pihak tidaklah di dalam petisyen penggulungan ini tetapi untuk pihak-pihak memfailkan saman sivil. Tugas mahkamah di sini bukanlah untuk mengulas mengenai isu kaveat yang dimasukkan tetapi kini

hutang tersebut adalah dipertikaikan (lihat perenggan 13).

(2) Notis tersebut yang dikeluarkan di bawah s 466 Akta Syarikat 2016 bukanlah bukti hutang. Untuk terus meneruskan prosiding penggulungan apabila hutang yang dikatakan betul-betul dipertikaikan, mewujudkan penyalahgunaan proses mahkamah. Pempetisyen sepatutnya dan sewajarnya memfailkan tindakan berasingan di mahkamah sivil untuk tujuan tersebut. Pempetisyen mempunyai tuntutan silang terhadap pempetisyen yang mana secara wajarnya tidak boleh dihujahkan lagi. Pempetisyen mempunyai kebebasan untuk meneruskan dengan penghakiman terus di dalam saman sivil jika ketetapannya adalah responden tidak mempunyai pembelaan kepada tuntutannya. Apabila mendapat penghakiman, pempetisyen bolehlah kemudiannya memfailkan petisyen penggulungan terhadap responden berdasarkan jumlah penghakiman tanpa ada apa-apa prejudis terhadap pempetisyen (lihat perenggan 26–27).

(3) Mahkamah memutuskan bahawa memandangkan akaun-akaun akhir yang dikatakan dilampirkan kepada surat tanpa prejudis, ia sepatutnya ditolak dan/atau diumumkan sebagai tidak boleh diterima dan tidak boleh disandarkan oleh pempetisyen untuk membentuk asas kepada penggulungan ini. Selanjutnya, pempetisyen mempunyai kewajipan untuk membuktikan bahawa terdapat hutang yang tidak boleh dipertikaikan yang terhutang oleh responden dan responden tidak solven. Melalui afidavit-afidavit, pempetisyen tidak berbuat sedemikian (lihat perenggan 46 & 50).

(4) Bebanan dan kewajipan untuk pembuktian adalah pada pempetisyen untuk membuktikan bahawa responden tidak solven sama ada dengan menunjukkan bahawa syarikat adalah tidak aktif, tidak lagi di dalam perniagaan, tidak mempunyai cek-cek yang tidak berbayar yang signifikan ataupun penghakiman-penghakiman yang tidak dipenuhi seperti mana di dalam kes yang telah dinyatakan. Di dalam petisyen ini, ia adalah jelas bahawa berdasarkan akaun audit 2017 oleh responden, ia dapat dilihat daripada jumlah aset-aset dan libiliti-liabiliti bahawa terdapat surplus dan/atau nombor menjadi positif. Syarikat tersebut masih beroperasi dan di dalam proses untuk menjual baki-baki unit-unit yang tinggal. Unit-unit yang mempunyai pembeli-pembeli yang telah pun membuat bayaran, tidak boleh dimaterialkan kerana pempetisyen telah menghalang pemindahan untuk berlaku. Baki unit-unit yang masih ada dan/atau dipindah telah diberhentikan kerana tindakan pempetisyen sendiri (lihat perenggan 52–53).

(5) Pempetisyen telah melanggar terma-terma dan syarat-syarat di dalam perjanjian usaha sama dan juga kuasa wakil yang datang bersamanya. Selain itu pempetisyen, meminta pembayaran dan memohon responden untuk menuruti perjanjian usaha sama, tetapi pada masa yang sama

meletakkan kaveat kepada semua unit-unit yang tidak terjual sebelum petisyen difailkan. Pempetisyen maklum bahawa terdapat unit-unit yang mana pembeli telah membuat bayaran penuh dengan pindahan tetapi tidak dapat dilaksanakan kerana kaveat pempetisyen sendiri. Tindakan pempetisyen sendiri telah menyebabkan responden tidak dapat merealisasikan aset-aset/unit-unit kepada mata wang dan menyebabkan responden mengalami kehilangan dan kerugian besar (lihat perenggan 61–62).

(6) Pempetisyen dengan ini menyebabkan kesusahan kepada diri sendiri dan peristiwa dan kejadian-kejadian yang diadukan dan kini tidak boleh kembali ke mahkamah untuk mengambil kesempatan terhadap kesalahannya sendiri. Pempetisyen sepatutnya menafikan tuntutan kerana tidak datang dengan tangan yang bersih. Ini adalah secara terang penyalahgunaan proses penggulungan kerana petisyen ini telah dibentangkan berdasarkan dokumen-dokumen yang dilampirkan kepada surat-surat tanpa prejudis dan istimewa dan juga berdasarkan pertikaian penting hutang. Pempetisyen tidak layak untuk memohon untuk perintah penggulungan (lihat perenggan 63–64).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1801–1973.

Cases referred to

Animation Theme Park Sdn Bhd v ZJ Advisory Sdn Bhd [2018] 9 MLJ 202; [2018] 3 CLJ 225, HC (refd)

Ban Hong Co Ltd, In Re [1959] 1 MLJ 100 (refd)

Bank Utama (M) Bhd v GKM Amal Bhd [2000] 5 MLJ 657; [2000] 2 CLJ 525, HC (refd)

Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors [2006] 4 MLJ 421, HC (refd)

Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd [1988] 3 MLJ 49; [1988] 1 CLJ 649; [1988] 1 CLJ Rep 618, HC (refd)

KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd [2014] 8 MLJ 434, HC (refd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1; [2009] 6 CLJ 626, CA (refd)

Malayan Banking Bhd v Foo See Moi [1981] 2 MLJ 1; [1981] 1 LNS 95, PC (refd)

Nima Travel Sdn Bhd; Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd, Re [1986] 2 MLJ 374 (refd)

Pembinaan Purcon v Entertainment Village (M) Sdn Bhd [2004] 1 MLJ 545, HC (refd)

Sri Hartamas Development Sdn Bhd v MBF Finance Bhd [1992] 1 MLJ 313;

A [1992] 1 CLJ 637; [1992] 1 CLJ Rep 303, SC (refd)
Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman [2009] 1 MLJ 580, CA (refd)
Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation) [2006] 1 MLJ 446; [2005] 2 CLJ 676, CA (refd)

B **Legislation referred to**

Companies Act 2016 ss 464, 465(1)(e), 466
National Land Code Forms 14A, 19B

C *HS Tan (Peter Huang & Richard) for the petitioner.*
Karen Lim (Nicholas Lim with her) (Presgrave & Matthews) for the respondent.

Azmi Abdullah JC:

D INTRODUCTION

[1] The relevant cause papers for this winding up petition are as follows:

(a) the winding up petition dated 6 September 2018;

E (b) affidavit verifying petition dated 7 September 2018;

(c) *afidavit jawapan menentang pempetisyen penggulungan* dated 26 September 2018;

(d) *afidavit jawapan pempetisyen* dated 11 October 2018;

F (e) *afidavit balasan responden* dated 29 October 2018;

(f) *afidavit jawapan pempetisyen* dated 7 November 2018;

(g) additional affidavit in reply dated 7 November 2018; and

G (h) *afidavit jawapan pempetisyen* dated 19 November 2018.

[2] The petition pertains to a dispute between the petitioner/landowner and the respondent/developer and is based on the ground that the respondent is unable to pay its debt (which has been denied) under ss 466 and 465(1)(e) of
H the Companies Act 2016 after the respondent having made no payment for the alleged debt of RM1,214,266.74 plus interest of RM103,017.02, within a period of 21 days as required in the statutory notice dated 31 July 2018 ('the said notice').

I **[3]** It is an undisputed fact that the alleged debt of RM1,214,266.74 plus interest of RM103,017.02 is *not a judgment debt* in the present case. As such, the question for the court to consider is whether the petitioner is a creditor and whether the amount claimed as stated in the said notice is actually owing and due.

CONTENTIONS DELIBERATED

Whether the alleged debt of RM1,214,266.74 with interest of RM103,017.02 is a bona fide disputed debt

[4] The respondent contend that the respondent has in the past made part payment to the petitioner under the joint venture agreement in the sum of RM1,143,400. The sum in dispute now is the final entitlement of the parties under the joint venture agreement dated 9 September 2009, as per cl 2(a)(i) which reads as follows:

> 2. BALASAN
>
> (a) Sebagai balasan kepada persetujuan-persetujuan dalam Perjanjian ini, maka kedua-dua pihak Tuan Tanah dan Pemaju bersetuju bahawa:
>
> (i) *Tuan Tanah berhak ke atas Dua Puluh satu Peratus (21%) daripada Nilai Jualan* unit-unit tersebut yang akan dibina di atas Tanah tersebut (selepas ini disebut 'Balasan Tuan Tanah') manakala *Pemaju pula berhak ke atas baki Tujuh Puluh Sembilan Peratur (79%) Nilai Jualan* daripada unit-unit tersebut yang akan dibina di atas Tanah tersebut (selepas ini disebut 'Balasan Pemaju')
>
> (ii) *Untuk tujuan pembayaran Balasan Tuan Tanah,* kedua-dua pihak bersetuju bahawa pihak Tuan Tanah hendaklah dibayar *50 sen atas setiap Ringgit Malaysia* yang diterima oleh pihak Pemaju dalam projek pembangunan ini *setelah pihak Pemaju menerima wang sebanyak Ringgit Malaysia Tiga Juta (RM3,000,000.00) ('Kos Pembinaan')* termasuk deposit, bayaran berperingkat dari pembeli-pembeli dan tuntutan berperingkat daripada institusi kewangan di bawah perjanjian jual beli di antara pihak Pemaju dan pembeli, *sehinggalah Balasan Tuan Tanah diterima sepenuhnya oleh Tuan Tanah.*

[5] The respondent's contention is that the final entitlement of the petitioner cannot be ascertained yet until all the units have been sold. However, due to the petitioner's own acts, by caveating the eight units on 29 December 2017, the remaining units cannot be sold and cannot be realised into cash. (*Reference to OEH3 and OEH4 for the relevant land searches and caveat applications* (Form 19B) *lodged by the petitioner*).

[6] The respondent argues that the petitioner's actions in caveating all the relevant eight units which have yet to be sold and/or transferred is done in bad faith and in clear breach of the main joint venture agreement dated 9 September 2009 between parties as well as the power of attorney granted together with it. (*Reference to exhs WWTSB2 and WWTSB3 for the joint venture agreement and power of attorney both dated 9 September 2009*) with the caveat being challenged in the Ipoh High Court.

[7] The joint venture agreement dated 9 September 2009 expressly provides amongst others:

1. PERLANTIKAN

(a) *Tuan tanah dengan ini melantik Pemaju dan/atau nomineenya untuk memajukan, membina, memasarkan dan seterusnya menjual lot-lot tanah* yang akan dipecah bahagian bersama dengan bangunan-bangunan ...

(b) *Pemaju mestilah mengambil semua langkah yang munasabah, patut dan mungkin untuk memaju, membina, memasarkan dan seterusnya menjual unit-unit tersebut bagi pihak Tuan Tanah.*

[8] The respondent submit that the express terms and intention of the joint venture agreement is for the petitioner (ie the landowner) to allow the respondent (ie the developer) to build, develop and *thereafter sell* all the units on the said land therein.

[9] The petitioner on the one hand has neither terminated the joint venture agreement nor revoked the power of attorney that comes with it. Yet on the other hand, the petitioner has caveated all the relevant properties/units on the said land (Lot 748) and this has hindered and/or blocked the respondent from selling the units therein. The petitioner caveated the relevant units on 29 December 2017, which was long before this petition was filed with the caveat action being contested by the respondent.

[10] If the petitioner had not caveated the properties, the respondent could have realised all the assets (unsold units), verified the final sum owing to be paid, and could have sold the remaining units and utilised those monies to pay the petitioner that finalised sum hence the petitioner is the author of their own misfortune. There have also been letters/notices from the purchasers' solicitors for the refund of the purchase price paid in respect of some of the non-transferred units (*reference to exh SCO1*).

[11] Due to the petitioner's own actions, the respondent is left failing to finalise the final sum due and owing under the joint venture agreement and cannot even sell the remaining units to pay the petitioner. *The petitioner's actions in caveating the relevant properties on the said land (Lot 748) is therefore unlawful and in breach of the main joint venture agreement, and has caused substantial loss and damage to the respondent which the respondent possesses a counterclaim/cross-claim against the petitioner for the recovery of the relevant loss and damages faced by the respondent from third party claims due to the respondent's inability to transfer the propertieslunits even though the full purchase price has been paid.*

[12] The respondent has vigorously challenged the petitioner's actions as can

be seen through the letters in *exh 'OEH6' and 'OEH7'*. The respondent also filed applications for the caveat removal of the caveats filed by the petitioner and if successful in the applications, the respondent is entitled for assessment of damages and/or for the petitioner to be liable for any penalties and/or late charges faced by the respondent due to the petitioner's unlawful acts (*reference to exh '001-1' for the saman pemula dated 10 October 2018 for the caveat removal No Perserahan 188/2017*).

[13] Hence this court believes that the respondent has a valid counterclaim/cross-claim against the petitioner which can be set off against any sums due and owing to the petitioner, and the proper forum for the dispute and issues between parties is not in this winding up petition but for the parties to file a civil suit. The duty of the court here is not to delve into the issue of the caveat being entered but as of the moment the debt is clearly being disputed.

[14] The petitioner's final entitlement is subject to the fact that all the terms and conditions in the joint venture agreement and the power of attorney having been abided by the petitioner. The petitioner in caveating all the remaining units which have yet to be sold and/or transferred *has breached the main joint venture agreement dated 9 September 2009 between parties as well as the power of attorney granted together with it* (*reference to exhs WWTSB2 and WWTSB3 for the joint venture agreement and power of attorney both dated 9 September 2009*).

[15] The relevant extracts from the joint venture agreement dated 9 September 2009 are as follows:

> 5. WAAD TUAN TANAH
>
> Tuan Tanah dengan ini berwaad akan kepada Pemaju tersebut seperti berikut:
>
> (a) Tanah tersebut adalah *bebas dari sebarang bebanan dan sekatan ...*
>
> (b) Tanah tersebut bebas *daripada sebarang tindakan undang-undang.*
>
> (c) Melakukan atau menyebabkan untuk melakukan semua perkara yang diperlukan untuk mendapatkan Suratan Hakmilik berasingan bagi tanah tersebut atas kos dan perbelanjaan Pihak Pemaju.

[16] The relevant powers granted by the petitioner to the respondent under the irrevocable power of attorney ('surat kuasa wakil') dated 9 September 2009 are as follows:

> *6. Menandatangani perjanjian untuk menjual kesemua atau mana-mana Unit-Unit Pemaju* menurut Perjanjian Usahama tersebut yang terkandung di dalam hakmilik-hakmilik individu Tanah tersebut bersama bangunan-bangunan atau bangunan di atasnya.
>
> *7. Melaksana, menandatangani, memeterai dan menghantar-serahkan pindahmilik*

Unit-Unit Pemaju kepada pembeli-pembeli berkenaan dan membuat apa-apa perkara lain yang difikirkan sesuai dan perlu untuk membolehkan pindahmilik disempurnakan.

15. Kami dengan ini mengesahkan bahawanya *Surat Kuasa Wakil ini diberi dengan balasan tidak boleh dibatalkan oleh Tuan Tanah selagi Perjanjian Usahama* di antara Irama Jaya Development Sdn Bhd (740038-W) dan Wing Who Trading Sdn Bhd (541449-P) *berkuatkuasa dan mengikat waris-waris kami yang sah.*

[17] The express terms and intention of the joint venture agreement and the power of attorney granted with it, is for the petitioner to allow the respondent to build, develop and *thereafter SELL* all the units on the said land therein.

[18] The petitioner has *express continuing duties and obligations* as per the power of attorney and the joint venture agreement to ensure that the land is not encumbered and to do everything in their control to ensure that the respondent can sell and transfer all the relevant properties/units on the said land into the respective purchasers' names.

[19] *The petitioner has done the complete opposite and has encumbered its own land an on the one hand has not terminated the joint venture agreement, and not revoked the power of attorney* that comes with it. Yet on the other hand, the petitioner having been in clear breach of the joint venture agreement and the power of attorney, is demanding payment from the JV agreement.

[20] The joint venture agreement expressly provides the relevant remedies for the parties in the event of breach:

10. KEINGKARAN DAN PENAMATAN

(a) *Pemaju berhak untuk menuntut pelaksanaan secara spesifik* ('specific performance') *daripada Tuan Tanah* tersebut sekiranya pihak Tuan Tanah melanggar syarat-syarat yang tertakluk di dalam perjanjian ini dan sekiranya Tuan Tanah melakukan pemecahan terhadap terma-terma dan syarat-syarat Perjanjian ini.

(b) *Mana-mana pihak dalam Perjanjian ini berhak untuk menamatkan Perjanjian ini sekiranya pihak yang lagi satu itu telah melakukan pelanggaran peruntukan-peruntukan Perjanjian ini DENGAN SYARAT satu notis bertulis hendaklah terlebih dahulu diserahkan* kepada pihak yang satu lagi itu menuntutnya memuihkan perlanggaran tersebut dalam tempoh Tiga Puluh (30) hari daripada penerimaan notis tersebut tanpa menjejaskan hak masing-masing di sisi undang-undang.

[21] From the terms the petitioner's remedy is clearly provided in that the *joint venture agreement can be terminated by giving notice*, and the *petitioner should pursue the matter by way of civil suit* against the respondent for the alleged breach of the said agreement and *NOT by way of winding up petition. The*

petitioner's actions can be deemed as an abuse of court process. A

[22] The petitioner cannot rely on its own breaches and unlawful actions to benefit itself as decided in *Su Wee Lip @ Philip Su v Hj Lassim Abdul Rahman* [2009] 1 MLJ 580: B

Held, dismissing the appeal with costs:

(1) From an analysis of the October deed, it was clear that the deed did not lapse and become null and void for all purposes when the defendant failed to deliver the titles to the stakeholder by 31 December 2000. The defendant could not also be allowed to take advantage of his own wrong. *In the sphere of contract law, a guilty party ought not to be permitted to take advantage of his own breach of the contract.* In the instant case, it was the defendant who, by his own omission, sought to bring an end to the October deed with the plaintiff being blameless. *To permit the defendant to do that would be to enable him to take advantage of his own wrong* (see para 10); *Gimstern Corporation (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302 followed. C D

[23] In *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626 it was decided: E

(1) *The evidence had established that the plaintiff was in breach of the express covenants* contained in cll 5.5 and 5.9 of the agreement. *Being the patty in breach of the law* — due to its failure to obtain the building approval for the construction of the building structures and the procurement of the licences to carry out the entertainment business in the building — *the plaintiff was precluded from enlisting the assistance of the court*. In other words, the plaintiff's illegal acts had precluded it from pursuing its action. *Ex turpi causa non oriter actio*. An action does not arise from a base cause. *Therefore, the plaintiff being the guilty patty could not be permitted to take advantage of its own breach of the express covenants contained in cll 5.5 and 5.9 of the agreement to which it had voluntarily subscribed* (paras 18, 19 & 20). F G

[24] With the debt in question as being claimed by the petitioner being *seriously and substantially disputed* by the respondent thus the petitioner is *not a creditor* as envisaged in s 464 of the Companies Act 2016 *and has no locus standi* to file this petition. H

[25] Since *no judgment is obtained* by the petitioner against the respondent in respect of the amount claimed and the affidavits showing that the respondent *bona fide disputes* the alleged debt on substantial grounds, then the respondent cannot be considered to have neglected to pay the alleged debt and it cannot be said the amount claimed as stated in the said notice is owing and due. I

[26] The said notice issued under s 466 of the Companies Act 2016 is not evidence of the debt. To continue to invoke winding up proceedings when the alleged debt is seriously disputed constitutes *an abuse of process of court.*

[27] The petitioner could and should have filed a separate action in the civil court for that purpose. The respondent have *a cross-claim* against the petitioner which has not reasonably been able to be litigated yet. The petitioner have the liberty to proceed with summary judgment in the civil suit if their stand is that the respondent have no defence to his claim. Upon getting a judgment, the petitioner can then file a winding up petition against the respondent based on the judgment sum without there *being any prejudice to the petitioner.*

[28] A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is disputed as deliberated in the above paragraphs. The court is not a debt collection agency thus this petition cannot stand and ought to be dismissed. In *Bank Utama (M) Bhd v GKM Amal Bhd* [2000] 5 MLJ 657; [2000] 2 CLJ 525 it was held:

> [1] *A disputed debt*, in the context of a winding-up petition, is a debt in respect of which it is shown, *with grounds supported by evidence*, that there is a bona fide dispute

[29] The precedent of *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49; [1988] 1 CLJ Rep 618 states that:

> [1] From the evidence it was clear that the respondent disputed the alleged debt and that in the circumstances *the petitioner is not a creditor within the meaning envisaged in s 217 of the Companies Act* and therefore is not entitled to issue the statutory notice or to file the petition in the present case as it had no locus standi to do so.

[30] In *Pembinaan Purcon v Entertainment Village (M) Sdn Bhd* [2004] 1 MLJ 545 it was decided:

> (2) *Since there was a bona fide dispute over the debt, the petitioner was not a creditor as envisaged under the Act.* The presumption of inability to pay the debt was a rebuttable presumption and towards this end, the respondent had succeeded in rebutting the presumption. The *respondent had a counterclaim or set off which equalled or exceeded the amount stated to be owing in the petition and that very amount was disputed on substantial grounds.*
>
> (4) There was therefore a bona fide dispute as to the debt. In such a situation, the respondent could not be said to have neglected to pay on a statutory demand. There was also a related general principle of law. A petition for winding up with a view to enforcing payment of a disputed debt was in fact an abuse of process of the court and should be dismissed forthwith with costs. Every case would depend on its peculiar facts. The dispute must be bona fide in both its subjective and objective senses. So, the reason for not paying the debt must be honestly believed to be in existence and must be based on substantial or reasonable grounds. *Here, there was a set off or counterclaim based on substantial grounds* (see paras 30–31).

[31] The case of *Syarikat Mohd Noor Yusof Sdn Bhd v Polibina Engineering Enterprise Sdn Bhd (in liquidation)* [2006] 1 MLJ 446; [2005] 2 CLJ 676

enunciated that:

> [1] *The presumption that the appellant was unable to pay its debts did not arise as the appellant was still solvent.* The indebtedness was clearly disputed and the sum referred to in the respondent's notice issued under s 218(2) was not a judgment sum. *That notice was nothing more than a letter of demand* sent by the respondent's solicitors, the purpose of which was to invoke the presumption of inability to pay debts. *The respondent still had to prove that it was a creditor and the sum so stated in the notice was owed and due.*

[32] Zakaria Yatim J (as he then was) further said *Jurupakat Sdn Bhd v Kumpulan Good Earth (1973) Sdn Bhd* [1988] 3 MLJ 49; [1988] 1 CLJ 649; [1988] 1 CLJ Rep 618:

> It is common ground that there is no judgment debt in the present case. The question for the court to consider is whether the petitioner is a creditor and the respondent is a debtor. A creditor is a person who could enforce his claim against the company by an action of debt and a person cannot petition as a creditor when he merely has a right of action against the company for unliquidated damages for breach of contract (see *Pennington's Company Law* (1985) 5th Ed p 843). *Where a petition is based on a debt which is disputed on substantial grounds, the petitioner is not a creditor* (see *Re Lympne Investment Ltd* at p 389). *If the petitioner is not a creditor, it is not entitled to present a petition or apply for a winding-up order. It has no locus standi and the petition must fail* (see *Mann & Another v Goldstein & Another* at p 771).

[33] In *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1992] 1 MLJ 313; [1992] 1 CLJ 637; [1992] 1 CLJ Rep 303 the court held that the function of such a notice is to warn the debtor of an impending petition. *The notice must also relate to a specified debt whose amount or existence cannot be seriously questioned. Where the amount is questionable or suspect and there is no judgment sum to support it, the petition should be dismissed. In Re Ban Hong Co Ltd* [1959] 1 MLJ 100 it was held that a petition instituted for the purpose of enforcing a disputed debt is an abuse of process of the court and will be dismissed with costs. Rigby J said (at p 103):

> *It is well settled law that a winding-up petition is not to be used as machinery to try a common law action, and that the presentation of a petition for winding up simply with a view to enforcing payment of a disputed debt is an abuse of the process of the Court and should be dismissed with costs.*
>
> ... We find that the respondent has not exhausted all remedies available to them as provided for under the said contracts. The dispute should be referred to the superintending officer or to arbitration as the case may be as provided for under the said contracts. *There is nothing to prevent the respondent from filing a writ against the appellant if everything else fails. We would agree with the views of Rigby J expressed in In re Ban Hong Co Ltd. A winding up petition is not a legitimate means of seeking to enforce payment of a debt which is disputed.*

The existence of a valid counterclaim/cross-claim against the petitioner

[34] The petitioner cannot on the one hand caveat the remaining units and block the respondent from selling the units to abide by the joint venture agreement while at the same time demand for payment when the petitioner's actions are in breach of the joint venture agreement and the power of attorney.

[35] Evidence has been furnished that some of the purchasers of the remaining units who have paid the full purchase price, are awaiting the transfer of the properties into their names. However, due to the petitioner's caveats, these transfers cannot be perfected even after the Form 14A has been presented for adjudication (*reference to exh OEH5 for the stamp certificate and the Form 14A/memorandum of transfer*).

[36] This is further supported and evidenced by the fact that some of the purchasers have even sent notice of demands to demand for full refund of the purchase price paid due to the inability to transfer the units into the purchasers' names (*reference to exh SCO1 for notice of demand*).

[37] The petitioner have therefore caused the respondent to be in breach of the following relevant clauses in the S&P with the purchasers:

(refer to exh OEH1A)

10. NON-REGISTRATION OF TRANSFER

10.1 *If the said Property cannot be registered in favour of the Purchaser(s)* for reasons attributable to the Vendor(s) due to his acts and/or his omission then the *Purchaser(s) shall be entitled at its option to take such action to enforce this Agreement by specific performance and to claim for any loss or damage and cost* of enforcement incurred or suffered by the Purchaser (s) as a result of the transfer not being registrable.

10.2 In the alternative, *the Purchaser(s) shall be entitled at its option to request the Vendor(s) to refund forthwith the full purchase price* together with all costs incurred by the Purchaser(s) (in respect of the transaction herein) ...

(refer to exh OEH2A)

33. SUSPENSION OF PAYMENT OF THE PURCHASE PRICE

... *if the Property at any time* during the continuance of this Agreement *is howsoever encumbered or subjected to any caveats* whatever for reasons attributable to the Vendor(s) ... *the Purchaser(s) shall either be entitled to suspend the time for payment of the Purchase Price hereunder until the said encumbrance or caveat as the case may be is removed or forthwith request for a refund of all sums of money already paid to the Vendor(s)* hereunder, whereafter, upon payment by the Vendor(s) to the Purchaser(s) free of interest within fourteen (14) days from the date of request this Agreement shall be deemed to be terminated and of no further effect.

[38] Therefore, the *respondent is at risk of being in breach of the sale and purchase agreements already entered and at risk of having to refund the purchasers the full purchase price*, and as for the purchasers pending the granting of bank loans, the purchasers cannot obtain the bank loans due to the caveats lodged by the petitioner and therefore monies from these units cannot be collected and/or utilised to pay the petitioner.

[39] Therefore, if the purchase prices have to be returned then the final amount owed is also subject to change and uncertain. The petitioner's acts is therefore unlawful and in serious breach of the joint venture agreement and the respondent have a valid counterclaim/cross-claim against the petitioner for the acts done against the respondent.

[40] It is also discovered that the said land (Lot 748) is subject to another joint venture agreement and another piece of land (ie Lot 747) wherein the respondent is also heavily disputing the unlawful termination and alleged revocation of the power of attorney (*reference to exh '001-3' for the joint venture agreement dated 9 September 2009 for Lot 747 together with the power of attorney*).

[41] The respondent also has a potential cross-claim/counterclaim against the petitioner for a sum of approximately RM402,901.09 for the wasted expenditure and/or loss incurred by the respondent due to the petitioner's unlawful termination (*reference to exh '001-4' for the respondent's notice of demand for Lot 747*).

[42] This court is satisfied that Lot 747, is also connected and related to the current Lot 748. Both agreements make reference to each other and are to be developed as Phases 1 and 2. The respondent have challenged the termination of the joint venture agreement of Lot 747 as being unlawful, and the respondent have also suffered damages and losses as a result. The respondent therefore also possess a valid counterclaim/cross-claim in respect of Lot 747, which will set off the amount owing to the petitioner. Therefore, the debt cannot be an undisputed sum and the respondent cannot be said to be insolvent.

[43] Therefore, the proper forum for the dispute and issues between parties is not in this winding up petition but for the parties to file a civil suit. In *Re Nima Travel Sdn Bhd; Sun Soon Heng Coach Works Sdn Bhd v Nima Travel Sdn Bhd* [1986] 2 MLJ 374 it was held:

> On the facts before me I am satisfied that there is a bona fide dispute as to whether there is a debt due from the respondent to the petitioner and also the quantum of such debt. *The proper course of action for the plaintiff the moment they knew that their claim was disputed, was to establish their debt by filing an action to have the matter*

adjudicated upon in the usual way. If they were so convinced of the strength of their case, they could have applied for summary judgment.

Final account affixed with 'Without Prejudice'

[44] The respondent submit that the accounts relied on by the petitioner (*reference to exh 'WWTSB4'*) for the basis of this winding up petition is *not a final accounts*, and moreover the accounts prepared dated 26 April 2018 was *attached to a WITHOUT PREJUDICE letter* (reference *to exh 'OEH8'*) which was merely for purposes of settlement and on the basis that the petitioner would accept two units in kind and the remaining RM267,586.74 is to be paid in money (cheque).

[45] The petitioner have taken the stand to refuse to accept the without prejudice offer, yet rely on the accounts enclosed in the without prejudice offer as a final account. The figure therein was merely for settlement purposes, and was only calculated on the basis that the two units therein would be accepted by the petitioner. Failing which, the figure is undetermined and not finalised as of the filing of this petition, and the petitioner should file a civil suit instead and not a winding up petition.

[46] This court finds that since the alleged final accounts was annexed to a without prejudice letter, it should be dismissed and/or declared inadmissible and cannot be relied on by the petitioner to form the basis of this winding up. In *Malayan Banking Bhd v Foo See Moi* [1981] 2 MLJ 1; [1981] 1 LNS 95 it was decided:

> It is *settled law that letters written without prejudice are inadmissible in evidence* of the negotiations attempted. This is in order not to fetter but to enlarge the scope of the negotiations, so that a solution acceptable to both sides can be more easily reached. But it is also settled law that where the negotiations conducted without prejudice lead to a settlement, then the letters become admissible in evidence of the terms of the agreement, unless of course the agreement has become incorporated in another document which would then be the evidence of the agreement. Per Chang Min Tat FJ.

[47] The precedent of *Animation Theme Park Sdn Bhd v ZJ Advisory Sdn Bhd* [2018] 9 MLJ 202; [2018] 3 CLJ 225 held:

> (2) The sequence of correspondences via emails and letters showed that not only was there a dispute but they were trying to reach a compromise as to the dispute. *The tone of the correspondences would indicate one of compromise and one geared towards a settlement*. Therefore, the letter dated 1 December 2016, considered together with the sequence of events *would be a privileged communication under the 'without prejudice' rule. It was therefore inadmissible as a piece of evidence* (paras 48–49).
>
> (3) *The finding that the letter dated 1 December 2016 letter was inadmissible because*

it was privileged communication, would be detrimental to any winding up petition contemplated by the defendant against the plaintiff. The petition would have no chance of success as there would be no evidence to show the plaintiff was unable to pay its debts. The statutory demand was not based on any judgment from the court (para 56).

(5) *The dispute could have been brought by way of a writ action and ventilated therein rather than winding up proceedings.* The presentation of a winding up petition could therefore be construed as an improper use of the process and the plaintiff should be freed from the improper pressure imposed by the defendant by this court granting this injunction (paras 59–60).

[48] From those authorities it is clear that without prejudice correspondences and offers cannot be referred to or relied on unless there was a final settlement between parties from that.

[49] Furthermore, in *Animation Theme Park,* the learned judge was faced with similar facts to the present case *ie* that the petition was based on an alleged without prejudice admission, there was no judgment or court order and no civil suit filed in respect of the disputed debt. The learned judge in that case found that in light of the letter being inadmissible due to privilege, and the fact that there was no judgment or suit filed, the petition would have no chance of success.

[50] Similarly, in this case, the petitioner cannot rely on the without prejudice document to form the basis of the petition. The petitioner have the onus of proving that there is an undisputed debt owed by the respondent and that the respondent is insolvent. From the affidavits, the petitioner simply has not done so.

Solvency of the respondent

[51] The case of *KNM Process Systems Sdn Bhd v Mission Biofuels Sdn Bhd* [2014] 8 MLJ 434 provides the necessary principle:

[27] In *Datuk Mohd Sari bin Datuk Hj Nuar v ldris Hydraulic (M) Bhd* [1997] 5 MLJ 377; [1996] 3 CLJ 877, *the High Court preferred the 'overall assets and liability test' over the 'quick assets test' in determining the insolvency of the company under s 218(2)(c)*. In that case, the petitioner claimed a debt of RM30m against the respondent. He presented a winding up petition under s 218(1)(e) read with s 218(2)(c) and s 218(1)(i). The respondent applied to strike out the petition on the grounds that it was, inter alia, an abuse of the process of the court. *The High Court held that the respondent was not insolvent as there was a surplus of total assets over total liabilities* amounting to RM329m. At pp 390 (MLJ); 895 (CLJ), Kamalanathan Ratnam JC (as he then was) said:

> Section 218(2)(c) is very clear. To ascertain if a company is unable to pay its debt the court shall take into account the contingent and prospective liabilities of the company. In order to ascertain its liabilities, it is proper that its assets are also

ascertained because only upon ensuring that there is insufficient assets to meet the debts can there be ascertained liabilities. Therefore, the current assets must be taken stock of to see if after considering the total liabilities both contingent and prospective there is a surplus deficit.

(Burden of proof under s 218(2)(c))

[28] Where a creditor, including a contingent or prospective creditor has elected to proceed under s 218(2(c), *the onus of proof is on the creditor to prove to the satisfaction of the court that the company was unable to pay its debts.*

[29] The question of whether a company is unable to pay its debts is essentially question of fact. *The creditor must establish the facts to show that the company is insolvent. It can be proved through evidence showing that the company's cheques have been dishonoured or that it has a significant number of unpaid debts and unsatisfied judgments.* It may also be proved by showing that the company has ceased trading or business activities altogether or has no assets. The fact that a receiver and manager has been appointed under a debenture to take possession of its assets may also be a significant factor.

[52] Hence, ultimately the burden and/or onus of proof is on the petitioner to prove that the respondent is insolvent by either by showing that the company is dormant, no longer in business, has significant unpaid cheques or unsatisfied judgments as per the case cited.

[53] In the present petition, it is clear that based on the audited account for 2017 of the respondent (*reference to exh '001-2'*), it can be seen from the total assets and liabilites that there is a surplus and/or the figure being postive. The company is still functioning, and in the midst of selling the remaining unsold units. The units which have purchasers who have actually paid, cannot be materialised as the peititoner has prevented the transfer to go through. The remaining pending units unsold and/or not transferred have been halted due to the petitioner's own acts (*reference to OEH1 A&B and OEH2 A&B for the S&P of four of the remaining eight unsold/non transferred units*).

[54] This court is satisfied that if the petitioner had not caveated the units (on 29 December 2017 (approximately nine months before the winding up petition was filed), the respondent could have liquidated and realised its assets (the unsold units) and the monies could have been used to pay the petitioner. It is thus gathered that the respondent company is now in this precarious position where it cannot sell the unsold units is because of the caveats and yet cannot abide by the joint venture agreement while the petitioner have not terminated the agreement and have not filed any civil suit against the respondent. Therefore, the petitioner's allegations that the respondent is insolvent is baseless and unsupported by any documentary evidence, and the petitioner is the author of their own misfortune.

[55] The respondent also disputes that the petitioner is entitled to interest of 6% at all. Clause 4(f) of the agreement is disputed as it merely states that the petitioner (ie landowner) can give a reasonable extension of time to the respondent (ie developer) which is agreed upon by both parties if the delay is not caused by the developer or caused by circumstances beyond the developer's control.

[56] The respondent disputes firstly that the petitioner is entitled to this 6% interest at all. Secondly, the respondent questions what is the reasonable extension of time given and/or agreed between both parties? This is unclear. The respondent also denies the method of calculation of interest and from which date the interest is calculated from.

[57] This court concurs that the figure as demanded for in the petitioner's statutory notice is uncertain and needs to be ascertained first before filing a winding up petition. This petition is premature and an abuse of court process and therefore should be dismissed.

[58] This court finds that the respondent is a solvent company which is able to pay its debts (if any) because based on the accounts, total assets minus total liabilities, it remains positive.

[59] Furthermore, the remaining units unsold once sold and/or transferred, would accumulate more than enough funds to settle the alleged debt, if the actual amount is ascertained via a civil suit.

[60] Therefore, the respondent is a solvent company and the petitioner has failed to show or prove that the respondent is insolvent when in fact the petitioner themselves are insolvent as the petitioner is a dormant company.

THE PETITIONER HAVE COME TO COURT WITH UNCLEAN HANDS

[61] The petitioner is in breach of the terms and conditions in the JV agreement as well as the power of attorney that comes with it. The petitioner on the one hand, demands payment and demands the respondent to abide by the JV agreement, yet at the same time caveats all the unsold units long before the petition was even filed.

[62] The petitioner is well aware that there are units which purchasers have made payment for the full purchase price of the units with the transfers of which cannot be executed due to the petitioner's own caveats. The petitioner's own actions have caused the respondent to be unable to realise the assets/units into monies and have caused the respondent grave losses and damages as well.

[63] The petitioner hence is the author of their own misfortune and the events and incidents complained of and cannot now come to court to take advantage of his own wrongdoings. The petitioner should thus be denied the relief in the absence of clean hands. In *Eng Man Hin @ Ng Mun Heng & Anor v King's Confectionery Sdn Bhd & Ors* [2006] 4 MLJ 421 *it was held*:

> (10) The petitioners were not entitled to ask for the aid of the court's just and equitable relief since they have not come with clean hands, being the cause of the problems. Having regard to all the circumstances of the case, on the balance of probabilities, that *the petitioners were the author of the events and incidents complained of. It was plain and obvious that the whole basis of the petition was predicated on the petitioners' own 'unclean' conduct and the petition was clearly an abuse of process and ought to be struck out with costs* (see para 81).

CONCLUSION

[64] Based on the above, it is clearly an abuse of process for this petition to have been presented based on a document annexed to a without prejudice and privileged correspondence, as well as based on a substantially disputed debt. The petitioner is thus not entitled to apply for a winding up order and this court dismisses the winding up petition with costs.

Winding up petition dismissed with costs.

Reported by Addibah Adnan